

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

05

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

R & B FOODS, INC.; BENJAMIN D. BRIENZA,

Defendants.

MAGISTRATE JUDGE *Alexander*

CIVIL ACTION

FILE NO.

RECEIPT #

AMOUNT \$ ~~3~~ N/A

SUMMONS ISSUED *Y*

LOCAL RULE 4.1

WAIVER FORM

MCF ISSUED

BY DPTY. CLK. *FOM*

DATE *7/19/05*

COMPLAINT

Elaine L. Chao, Secretary of the United States Department of Labor, hereby alleges:

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and is brought pursuant to ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132 (a)(2) and (5) to redress violations and to enforce the provisions of Title I of ERISA.

2. The Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. Venue of this action lies in the District of Massachusetts pursuant to Section § 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

4. Defendant R & B Foods, Inc. ("R&B") was, during the period from January 1, 2000 through December 2002, an employer within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5).

5. From January 2000 through December 2002, Defendant R&B was a corporation with an office and place of business in Haverhill, MA, within the jurisdiction of this Court.

Defendant R&B ceased operations in December 2002.

6. From January 2000 through the present (the “pertinent period”), Defendant Benjamin D. Brienza (“Brienza”), has been the President and sole owner of Defendant R&B. Defendant Brienza currently resides at 1122 North Lion Cub Path, Lecanto, Florida 34461.

7. On January 1, 1999, Defendant R&B established the R & B Foods, Inc. 401(k) Profit Sharing Plan (the “Plan”), an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and which is covered under ERISA pursuant to § 4(a), 29 U.S.C. § 1003(a).

8. The purpose of the Plan is to provide retirement benefits for the exclusive benefit of its participants, employees of Defendant R&B, and their beneficiaries.

9. During the pertinent period, Defendant R&B has been the Plan Sponsor, as defined by ERISA § 3(16)(B)(i), 29 U.S.C. § 1002(16)(B)(i), and Plan Administrator and a named fiduciary pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

10. During the pertinent period, Defendant R&B, as the Plan Sponsor and Plan Administrator, exercised discretionary authority or discretionary control respecting management of the Plan and discretionary authority or discretionary control respecting management or disposition of the Plan’s assets, and had discretionary authority or discretionary responsibility in the administration of the Plan. Therefore, Defendant R&B was, during the pertinent period, a fiduciary to the Plan as that term is defined in Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

11. During the pertinent period, Defendant R&B was a party in interest within the meaning of ERISA § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C).

12. During the pertinent period, Defendant Brienza has been a Trustee of the Plan and a “named fiduciary” with respect to the Plan within the meaning of ERISA § 402(a), 29 U.S.C. § 1102(a).

13. During the pertinent period, Defendant Brienza exercised discretionary authority or discretionary control respecting management of the Plan and discretionary authority or discretionary control respecting management or disposition of the Plan’s assets, and had discretionary authority or discretionary responsibility in the administration of the Plan. Therefore, Defendant Brienza was, during the pertinent period, a fiduciary to the Plan as that term is defined in Section 3(21) of ERISA, 29 U.S.C. § 1002(21).

14. During the pertinent period, Defendant Brienza has been a party in interest within the meaning of ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and (H).

15. According to Plan documents, the Plan was to be funded by withheld employee contributions each pay period as determined by participant elections in amounts ranging up to the maximum percentage allowable under the Internal Revenue Code.

16. During the pertinent period, the contributions withheld on behalf of each Plan participant became assets of the Plan by operation of 29 C.F.R. § 2510.3-102.

17. The Plan document states that no part of the Plan Trust Fund, which includes employee contributions, may be used for, or diverted to, purposes other than for the exclusive benefit of participants and beneficiaries and that the Plan was required to be administered in accordance with the terms of ERISA.

18. From January 2000 through and including June 2000, Defendants failed to forward withheld employee contributions in a timely manner.

19. Defendants failed to remit withheld employee contributions to the Plan from on or about July 2000 through December 2000. The unremitted employee contributions totaled approximately \$9,400 and are due and owing to the Plan.

20. On October 5, 2001, Defendant Brienza caused a distribution check to Participant Brian Murphy, in the amount of \$6,390.15, to be deposited into Defendant R&B's business account.

21. Defendants never transferred the \$6,390.15 of Plan assets to Participant Murphy.

22. On or about February 4, 2002, Defendant Brienza caused all of the Plan's assets, totaling approximately \$47,000, to be withdrawn from Oppenheimer Funds, the Plan's Custodian, and deposited into Defendant R&B's business checking account at Banknorth.

23. Approximately \$18,100 of the \$47,000 belonged to Participants other than Defendant Brienza.

24. Plan assets that were improperly transferred to R & B, and employee contributions that were withheld but not forwarded to the Plan, excluding Defendant Brienza's contributions and account balance, total approximately \$34,000, plus interest, and are due and owing to the Plan.

25. From July 2000 to the present, no measures were undertaken by Defendants, as fiduciaries to the Plan, to collect Plan assets that were improperly transferred to R&B or to collect employee contributions that Defendants failed to forward to the Plan.

26. As a result of the conduct set forth at paragraphs 18 through 25, Defendants failed to discharge their fiduciary duties for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA §§ 403(c)(1) and 404(a)(1)(A), 29 U.S.C. §§ 1103(c)(1) and 1104(a)(1)(A).

27. As a result of the conduct set forth at paragraphs 18 through 25, Defendants failed to discharge their fiduciary duties with the required degree of care, skill, prudence and diligence, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

28. As a result of the conduct set forth at paragraphs 18 through 25, Defendants failed to act in accordance with the Plan document, in violation of ERISA § 404(a)(1)(D).

29. As a result of the conduct set forth at paragraphs 18 through 25, Defendants engaged in prohibited transactions by causing or permitting the transfer of assets of the Plan to, or use of plan assets by or for the benefit of Defendant R&B, a party in interest, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

30. As a result of the conduct set forth at paragraphs 18 through 25, Defendants participated in what they knew or should have known constituted prohibited transactions by dealing with the assets of the Plan in their own interest or for their own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

31. As a result of the conduct set forth at paragraphs 18 through 25, Defendants participated in what they knew or should have known constituted prohibited transactions by dealing with the assets of the Plan on behalf of a party whose interests were adverse to the interests of the Plan and its Participants and Beneficiaries, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

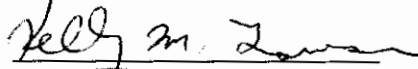
WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

- (a) Permanently enjoining Defendants from violating, or knowingly participating in violations of, the provisions of ERISA §§ 403, 404 and 406, 29 U.S.C. §§ 1103, 1104 and 1106.

- (b) Permanently enjoining Defendants from serving as fiduciaries to the Plan or any other employee benefit plan covered by ERISA;
- (c) Requiring Defendants to undo the prohibited transactions in which they engaged and to restore to the Plan any and all losses incurred as a result of breaches of their fiduciary duties and the violations they committed or for which they are liable, with appropriate interest;
- (d) Appointing an independent fiduciary to terminate the Plan and distribute Plan assets to Plan Participants;
- (e) Awarding to Plaintiff the costs of this action, and other relief as is equitable and just.

Howard M. Radzely
Solicitor of Labor

Frank V. McDermott, Jr.
Regional Solicitor


Kelly M. Lawson
Attorney

U.S. Department of Labor
Attorneys for Plaintiff

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Boston, MA 02203
TEL: (617) 565-2500
FAX: (617) 565-2142

DATE: July 18, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS1. Title of case (name of first party on each side only) Elaine L. Chao v. R & B Foods, Inc.

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

- I. 160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
- X II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 740, 720, 730, *Also complete AO 120 or AO 121
740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 898, 950. for patent, trademark or copyright cases
- III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310,
315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371,
380, 385, 450, 891.
- IV. 220, 422, 423, 430, 460, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660,
690, 810, 861-865, 870, 871, 875, 900.
- V. 150, 152, 153.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES ☐ NO ☒

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES ☐ NO ☒

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES ☐ NO ☐

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES ☐ NO ☒7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).YES ☐ NO ☒A. If yes, in which division do all of the non-governmental parties reside?Eastern Division ☐ Central Division ☐ Western Division ☐

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division ☒ Central Division ☐ Western Division ☐

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES ☐ NO ☒

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Attorney Kelly M. LawsonADDRESS Office of the Regional Solicitor, JFK Federal Bldg. Rm.E-375, Boston, Mass. 02230TELEPHONE NO. 617-565-2500

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) **PLAINTIFFS**
ELAINE L. CHAO, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Attorney Kelly M. Lawson 617-565-2500
JFK Federal Building - Room E-375
Boston, Massachusetts 02203

DEFENDANTS
R & B FOODS, INCORPORATED AND
BENJAMIN D. BRIENZA

County of Residence of First Listed Defendant Essex
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition				

V. ORIGIN (Place an "X" in One Box Only)

- ☒ Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):
ERISA Sec. 502(a)(2) and (5), 29 U.S.C. Sec. 1132(a)(2) and (5)

Brief description of cause:

To restore funds taken from the employee pension plan and to fund plan with

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
 DEMAND \$ withheld employee contributions.
 JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE July 18, 2005 SIGNATURE OF ATTORNEY OF RECORD

Attorney Kelly M. Lawson *Kelly M. Lawson*

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE